

Michigan Journal of International Law

Volume 25 | Issue 4

2004

Religious Freedom and the Undoing of the Westphalian State

Daniel Philpott
University of Notre Dame

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Human Rights Law Commons](#), [Legal History Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT'L L. 981 (2004).

Available at: <https://repository.law.umich.edu/mjil/vol25/iss4/11>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjlaw.repository@umich.edu.

RELIGIOUS FREEDOM AND THE UNDOING OF THE WESTPHALIAN STATE

*Daniel Philpott**

Not so long ago, in 1998, the world acknowledged both the fiftieth anniversary of the Universal Declaration of Human Rights and the 350th anniversary of the Peace of Westphalia. The Universal Declaration was celebrated in the popular press, by thousands of activists, and at well attended open forums at schools and universities. Westphalia was noted almost exclusively at academic conferences. But public obscurity is an undeserved fate for Westphalia, for its legacy in organizing our political world vies with that of the American and French revolutions. What Westphalia inaugurated was a system of sovereign states where a single authority resided supreme within a set of borders, constitutionally unchallengeable from within and without. Further warranting our remembrance are signs of its undoing. What Westphalia once secured in 1648 is cracking in ever widening webs. Since the end of the Cold War, international authorities—the United Nations, the European Union, NATO, others—have sanctioned intervention in venues as diverse as Iraq, Somalia, Rwanda, Haiti, Bosnia, Namibia, Cambodia, El Salvador, Nicaragua, Liberia, the Sudan, and Kosovo. All of these actions pry open the old doors of the norm of non-intervention, one of Westphalia's key attainments. They reverse history's momentum, for in consolidating a system of sovereign states, Westphalia ended centuries of evolution away from frequent, fierce, intervention. The Peace of Westphalia fastened the state's authority from outside claims, sealing the state as a vault. This seal would persist well into the twentieth century; the system of absolutely sovereign states that Westphalia wrought would prove to be one of modernity's most enduring institutions.

The tightness of the original seal resulted from the pressures of Westphalia's arrival. Over a century before Westphalia, Protestant reformers led thousands of Europeans to defy the Catholic Church, which in turn led Catholic authorities to respond with quelling armies, bringing on a century of battles and skirmishes, on and off, erupting finally into the holy cataclysm of the Thirty Years War, a war that took life on a scale unrepeated in Europe until the Twentieth century. This is why monarchs after Westphalia no longer intervened to enforce their religion. It is also in good part why the political authority of the Pope and Emperor faded.

* Daniel Philpott is Associate Professor of Political Science and Faculty Fellow at the Joan B. Kroc Institute for Peace Studies at the University of Notre Dame. He is author of *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* and now writes on reconciliation and on religion and international relations.

We may have also forgotten the carnage that brought us the sovereign state. Remembrance, though, may be worrisome. If today's erosion of sovereignty parallels early modern Europe's development of it, might not the same holy chaos skulk behind the changes? It seems unlikely at first. The new intervention is fueled by common aversion to mutually recognized suffering—starvation, anarchy, civil war—and not the particular claims of any revealed religion. Yet, religion and culture are neither irrelevant nor irenic in today's international politics. The conflict they provoke is not only still with us, but since the Cold War has swelled, not faded—most dramatically in the attacks of September 11, 2001. Involving non-state actors who pressure states to achieve their ends, sometimes carrying out violence themselves, often pursuing goals that involve populations in foreign states, it is the sort of conflict that makes heavy demands on sovereignty.

That era—prior to Westphalia—and this era, then, face two parallel trends: flux in sovereignty, and religious and cultural conflict. Out of both trends, in both eras, a common dilemma arises: If the sovereign state is to be pried open, with interference in its internal affairs increasingly permitted, are there shared values on which the interference can be grounded? The scale, breadth, and urgency of suffering evokes the hope for common norms by which sovereignty is limited. Or will the opening invite in holy chaos? The rise of religious and cultural conflict awakens the fear that claims on sovereignty will become rampant and uncontrollable. Is there a set of values whose claims to interfere with sovereignty can attain a global consensus but that do not deepen religious and cultural dissension? To put the question in the spirit of the present symposium, can international norms accommodate diversity? Or will attempts to construct them invite cacophony? The dilemma is heightened most by the advocacy of certain norms that are both arguably universal, justly demanded upon states, as well as religious in their content, evoking deep value conflicts. The human right of religious freedom, reasserted vigorously by American religious activists over the past decade and now the subject of vigorous oversight by the U.S. government, is precisely such a norm. Why the dilemma is difficult and why religious freedom is the most troublesome aspect can be understood through the agonistic politics of early modern Europe.

I. SOVEREIGNTY AND RELIGIOUS CONFLICT IN EARLY MODERN EUROPE

Early modern Europeans lived on the cusp between a system of sovereign states and much less streamlined organization of politics. This is

the first resonant parallel between that era and our own. Of course, history was moving in the opposite direction. Westphalian sovereign statehood consolidated centuries of evolution away from the high Middle Ages, a metamorphosis that appears sharpest in relief against this previous season at its peak. In the medieval *Respublica Christiana*, political authority was dispersed among the Pope, the Holy Roman Emperor, kings, nobles and bishops, but none of these authorities held sovereignty or supreme authority within a demarcated territory. Indeed, they thought of themselves as members of a common civilization with a common faith and shared values. Following its apogee, though, the Middle Ages shed its both its institutional diversity and its moral consensus. Over the next three and a half centuries section by section of the European landscape lost its political eclecticism and took on the form of a sovereign state.

The Peace of Westphalia consolidated this trend in 1648, signaling the official end to the Thirty Years War. Based on the principles of equality, autonomy, and a balance of power among states, the agreement settled disputes over religion, the powers of the Pope and the Emperor, and the boundaries and authority of particular policies—all compatibly with sovereign statehood. An obstinate Pope Innocent X issued a Bull, *Zel Domus*, calling the treaties, “null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, empty of meaning and effect for all time,” but a clause in the settlement had already declared pre-emptively that his protests would not nullify the treaties.¹ In practice, this clause prevailed.

Westphalia was a change of the most fundamental sort. It was, to be sure, a transition in hegemony—from the Habsburg Empire to France and Sweden, defenders of the sovereign state—but it also stood for much more. The signers of the agreement regarded themselves as the “Senate of Christian Europe,” but what they created was substantially more than a new organization among states, such as the League of Nations or United Nations. What arose at Westphalia was foundational—a new “constitution of international relations,” defining the basic legitimate political entities and their fundamental prerogatives. The sovereign state which it prescribed was Janus-faced, its government staring both inward at its subjects, over which it had supreme authority, and outward beyond the state’s borders, where no rival authority was entitled to force a change in the governance of its inhabitants.

Fundamental change in the organization of politics was the result of conflict over deep-seated questions of religion. The generative fire of confessional conflict is a second, more darkly redolent, parallel between early modern Europe and today. Although the past generation of social

1. DAVID MALAND, *EUROPE IN THE SEVENTEENTH CENTURY* 16 (1966).

scientists has mostly described the state as an efficient adaptation to economic and technological changes, these scholars have demonstrated these forces to be neither thorough nor inexorable. As late as 1517, Emperor Charles V was consolidating lands in Spain, central Europe, the Netherlands, and elsewhere into a vast quasi-medieval conglomerate, steering Europe sharply away from, not towards, Westphalia. Another force was needed.²

The Protestant Reformation created parties of Europeans who contested a uniform Catholic public order. Many, although not all, of the reformers sought to establish their own religion as uniform and public. The problem of the time, roiling through 130 years of religious warfare, was one of deep pluralism. Protestants finally won tolerance at Westphalia. Religious freedom for the individual was still long in coming, but specified Lutherans and Calvinists in specified regions could at this time freely practice their reformed creeds. Princes were to be unhindered in their governance of this practice which stood at the core of their new sovereignty. Pope Innocent X's condemnation, then, is not surprising, nor is the papal ban until the 1890's of the writings of Hugo Grotius, the intellectual godfather of Westphalia.

Philosophers and thoughtful statesmen of the time reflected upon the surfacing of sovereignty and the fissure of religion, and returned differing assessments. The dilemma of how to view the sovereign state is the third parallel between the past era and ours. Philosophers and statesmen of that time, like those of today, returned a ranging palette of answers. Many Catholics and Protestants alike insisted upon a uniform religious order—a restored Christendom for Catholics, confessionally homogeneous sovereign states for Protestants. They would fight a holy war for it. At the other unabashed extreme was Machiavelli, an eager prophet of a bold and novel secular, sovereign state.

Others were more reluctant and conflicted in their opinions. Still desiring a placid and faithful religious uniformity, but convinced that a sound political order could not endure religious war, many Catholics were willing to tolerate religious dissent, provisionally, for social peace. They thought like the *politiques*, the French Catholics who were willing to tolerate Huguenots in order to escape from a debilitating civil war. Outside the borders of the state, too, the *politiques* preferred state protection of religious pluralism over continental religious war. The institutional heart of the *politiques'* vision was this new, secular sovereign state free from the intervention of outside powers.

2. For further elaboration of these claims about the Reformation and the Peace of Westphalia, see DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* 76 (2001).

A final class of philosophers perceived and accepted the sovereign state as legitimate, but held that this sovereignty could, under some limited circumstances, be restricted by outsiders through intervention. These restrictions were rooted not in the particular claims unique to separate faiths, but in the duty of all rulers to uphold human values and goods that anyone could understand by virtue of a capacity to grasp natural law. Protestants such as Grotius, Hubert Languet, and Alberico Gentili, and Catholics such as Suarez and Victoria advocated common obligations of rulers to their people, asserted the duty of every government to uphold them, and proposed what we now think of as humanitarian intervention—an exceptional case of interference in another prince's realm, undertaken only when these common obligations were grossly abused. It was on a similar basis of natural law that Victoria and other Spanish theorists of the sixteenth century Salamanca school told their king that he could not violate the human integrity of colonized natives in the New World, who, after all, were fully human. Such obligations, they believed, any rational person could understand, whatever his theological commitments may be.³

Westphalia, however, in practice sealed shut these philosophers' dreams of limiting sovereignty for human rights. The absolutely sovereign state of Machiavelli, Hobbes, and Bodin, legitimately free from all intervention, won out instead. Westphalia, then, resolved the dilemma that haunts both early modern Europe and our own era: the status of the sovereign state. It is a dilemma created by two trends that both periods also experienced—the flux of sovereignty and religious tumult. Neither outside states nor international institutions could legitimately interfere in states' internal affairs. The sovereign state would prove robust, what Max Weber called an "iron cage," outlasting the religious furor that founded it. Since Westphalia, exceptions to and violations of the state's immunity from external interference have arisen, while the legitimate holders of sovereignty inside the state have also evolved from monarch to constitution or modern dictatorship. But for three centuries, the sovereignty of the state with respect to outside authorities has remained fairly constant, not unrevised, but constant, even while domestic holders of sovereignty have often changed. As late as 1960, the sovereign state was replicating itself across the globe as European colonial empires collapsed. It became the first universal form of political organization in history. This apotheosis came about only a generation ago.

3. On contrasting theories of sovereignty, see F.H. HINSLEY, *SOVEREIGNTY* (1986).

II. SOVEREIGNTY AND RELIGIOUS CONFLICT TODAY

Germany and gargantuan death were the site and circumstance of Europe's acceleration away from a universal polity to sovereign state segmentation in early modern Europe. In the twentieth century, it was Germany and the most gargantuan death in Europe since early modern times that led nations everywhere to begin again to reassert universal values that would restrict state sovereignty. Demonstrating the extremity of what a state could inflict when completely immune from outside criticism and interference, the Holocaust prodded Westphalia's reversal.

It was the Holocaust and the destruction resulting from World War II that animated the vast majority of states to sign the Universal Declaration of Human Rights in 1948, the year of Westphalia's tricentennial. Human rights would later gain legal clout from two United Nations covenants on human rights, several other covenants promoting specific rights, and from the European Court of Human Rights, whose substantial judicial powers limit state sovereignty. After the Cold War, human rights norms achieved a great advance forward in their assault on Westphalian sovereignty after the Cold War when international bodies began to authorize intervention where human rights abuses and massive suffering were taking place.

The first historically parallel trend, a transition in sovereignty, then, is a mirror image of early modern Europe. At that time, the sovereign state was consolidating; now, the vault of Westphalia is beginning to become unsealed. What of the other parallel trend of religious conflict? The worldwide acclaim and anger aroused by Samuel Huntington's "clash of civilizations" thesis, holding that the key global conflicts will increasingly be fought between religiously defined civilizations, testifies to the resonance of religious and cultural conflict.⁴ Whether Huntington correctly identifies the world's civilizations or overstates their coherence or susceptibility to conflict, a broad consensus of scholars will at least agree on the rising salience of religious and cultural loyalties over the past two decades and on the increased conflict between the societies of Islam and Asia with the West.⁵

4. See SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE MAKING OF WORLD ORDER* (1996).

5. See, e.g., BENJAMIN BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (1995); PETER L. BERGER, *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS* (1999); JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); MARK JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (1993); Rodney Stark, "Secularization, R.I.P.," 3 *SOCIOLOGY OF RELIGION* 60 (1999).

In an "Islamic Resurgence," most of the world's Muslim states, from Indonesia to Iran, have over the past two decades become more alienated from the West in their orientation, out of a renewed confidence in their own civilization, out of a reaction to a Western drive to universalize and spread its own civilization, and because of non-cultural factors such as rapid population growth and attendant unemployment and dislocation. The results have included tensions over weapons proliferation, Islamic migration into western societies, control of oil, the role of the West in conflicts involving Muslims such as the one Bosnia, and, disputes over the universality of human rights. At the 1995 U.N. Women's Conference at Beijing, for instance, Islamic states objected to the extent and nature of rights demanded for women, while at the 1993 U.N. Conference on Population Control in Cairo, Muslim states, as well as the Vatican, were at odds with UN elites over contraception as an element of family planning. Most poignantly, though, the Islamic resurgence has brought terrorism. The attacks of September 11, 2001 were indeed carried out by a faction of Islamic "revivalists" who, convinced that Islam had fallen into a pre-Mohammedan state of *jahilliya*, or barbaric ignorance, vowed *jihad* against defilers of Islamic civilization like the United States.

Cultural conflicts between Asian societies and the West, especially the United States, became more frequent in the 1990s as well. While Asian intellectuals and political leaders such as Singapore's Lee Kuan Yew asserted an "Asian Way" that dethroned political and civil rights in favor of cultural solidarity and the right to economic development, America has threatened to place economic sanctions upon Asian countries that violate human rights. In many contexts and venues, representatives of the West have asserted constitutional freedoms as universal entitlements, only to encounter Asian denials. In 1993, human rights activists touted that year's UN World Conference on Human Rights in Vienna as an opportunity to develop a broad consensus on universal human rights, but found themselves blocked by a coalition of mostly Asian and Islamic countries, who prevented agreement on anything but the most paltry statement of common beliefs. In the Bangkok Declaration just prior to the conference, a coalition of Asian states strongly opposed the "universal human rights regime" as a Western form of particularism and stressed in its place the principles of national sovereignty, non-intervention, and territorial integrity. Similar disputes have arisen as diplomatic incidents. In the summer of 1997, for example, the prime minister of Malaysia told the U.S. Secretary of State, Madeleine

Albright, that his country no longer subscribed to the Universal Declaration of Human Rights.⁶

None of these contemporary cultural tensions amount to, or even augur, the religious wars of early modern Europe. There are, however, resemblances in spirit. The cultural conflicts, for instance, have arisen over values that make claims across borders: Western human rights advocates and Islamic contenders both assert what is true for all people; Al Qaeda is a non-state actor who claims to speak on behalf of the umma, the globalized community of Muslims, and is determined to fight its enemies in whatever state they may exist; and Asian values, Confucian or Japanese Shinto, pertain to entire cultures, not single states. In response, the U.S. and other Western states intervene in other states to fight Islamic terrorism and make claims on the behavior of Asian states like China towards their own citizens. All over the world, much of the religious violence is secessionist or irredentist, involving the assertion of loyalties across borders. All such conflicts place heavy demands on sovereignty.

There are two historical trends, then, in which the present day mirrors early modern Europe. One is the plight of living between a system of sovereign states and a system with more variegated authority; the other is religious and cultural conflict. Completing the parallel between the present and the past era is a common dilemma to which the two trends, in the two periods, give rise. In a world of states where sovereignty is not absolute, where intervention often occurs, and where the proponents of universalistic religions and philosophies make more and more conflictual claims on other states' inhabitants, can we find a set of values that would justify intervention that commands at least a thin consensus of the international community? In other words, can we pry open the doors and poke holes in the walls of the Westphalia vault without letting delirium escape? In early modern Europe, the natural law philosophers' dream of attaining such a consensus failed; the era resolved its dilemma instead with an absolute proscription of intervention. Today's increase in cultural and religious conflict again gives rise to the same lamentable possibility. Just as Third World states were loathe to endorse humanitarian intervention during the Cold War, lest the superpowers would use it as a pretext for intervening for their own ideological causes, states today are unlikely to endorse norms that curtail sovereignty at a time when it is being increasingly violated by states and organizations with rivaling cultural and religious identities.

6. See JAMES T.H. TANG, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION* (1995).

Yet, today's international community arguably has dealt with the dilemma far more successfully. Since the end of the Cold War, states, even ones of differing ideology, culture, and regime, despite their growing cultural differences, have in fact been able mutually to agree upon intervention in many cases. In Bosnia, Somalia, Iraq, Haiti, Rwanda, Namibia, Cambodia, the Sudan, Liberia, El Salvador, Nicaragua, Kosovo, and elsewhere—enough instances to constitute a substantial trend—the UN, the European Union, NATO, the Organization of American States, and other international bodies, although not all in every conflict, have approved. These were measures that the consensus of states would have regarded as illegitimate interference by the standards of the Cold War and earlier times. In most of these cases, the interveners did not obtain the prior consent of the target state's government or the parties to a conflict, thus exceeding traditional peacekeeping operations that deferred to state sovereignty. The interventions, for instance, have delivered humanitarian food and medicine in war and famine, ended war, enforced peace, attempted to rebuild institutions, overthrown governments which violate human rights and democracy, conducted and monitored elections, and arrested war criminals.⁷

Not all of the interventions have been successful. Few of them have attained all of their original goals; most have resulted in mixed success; many of them have been unilaterally carried out, even if internationally sanctioned; and none was accomplished without disagreement among the major powers. Interventions in Kosovo and Iraq, for example, failed to win the approval of the UN Security Council. But what is historically remarkable is the cooperation of Security Council states in most of the cases. China, which constantly protested outside infringement of its sovereignty during this period, openly opposed intervention only in the cases of Kosovo and the Iraq war of 2003, and at worse abstained from Security Council votes in the other cases. Islamic states frequently supported the operations too. In 1996, Pakistan and Bangladesh were the two leading contributors of troops to UN peacekeeping and observer missions. The international consensus on intervention, then, though far from unblemished, is significant.

International judicial institutions that circumscribe sovereignty have also obtained a broad international consensus. During the 1990's, United Nations tribunals for Bosnia and Rwanda as well as the International Criminal Court were established to try people who had committed large-scale human rights violations, even within the borders of a single state. Though the opposition of the United States to the International Criminal

7. See Oliver Ramsbotham, *Humanitarian Intervention, 1990–95: A Need To Reconceptualize?*, 23 REV. INT'L STUD. 445 (1997).

Court detracts from this consensus, the court still commands the support of a whole spectrum of states representing a wide variety of cultures. Here, too, although not absolutely solid, the consensus is widespread. Finally, in Europe, over twenty states have now combined their sovereign powers in the supranational institution of the European Union, the most radical departure from traditional Westphalian sovereignty to date.

In sum, it seems that today we have come much closer than the early modern Europeans to realizing the dream of those philosophers Grotius, Victoria, Suarez, Gentili, and Languet, who tolerated the sovereign state, but supported intervention against princes who committed commonly recognizable atrocities. Most of the wrongs redressed by today's interventions—starvation, genocide, human rights violations, war crimes—are similarly widely recognized wrongs. Cultures that may clash over other issues can recognize *these* conditions as worthy of international remedy.

Witnessing the "commonness" of these evils are also broad groups of philosophers and theologians from the very traditions whose peoples are increasingly clashing. Scholars of Islamic ethics such as Sohail Hashmi argue that humanitarian intervention and "core human rights"—rights to life, bodily integrity, subsistence—find strong support in mainstream Islamic theology.⁸ The Western tradition, which is home to the doctrine of human rights, is strengthened by the strong support of human rights by the Catholic Church following the 1960's Vatican II council, and by many Protestant denominations. Many scholarly and public spokespeople for Asian cultures, too, insist that none of the communal Asian virtues preclude endorsement of core universal human rights. Today's consensus is, therefore, substantial in both philosophy and practice.⁹

III. THE DIFFICULT MATTER OF RELIGIOUS FREEDOM

The contemporary era, then, will not be one in which the sovereign state remains sealed shut. With greater consensus on the appropriateness of interference in borders on behalf of human rights, the contemporary sovereign state can be opened without unleashing delirium. There remain, however, issues on whose behalf some will propose to limit sovereignty but that will be hotly contested and inimical to the revival of

8. Sohail Hashmi, *Is There An Islamic Ethic of Humanitarian Intervention?*, in *ETHICS AND INTERNATIONAL AFFAIRS* 55 (1993).

9. See Max Stackhouse & Stephen E. Healey, *Religion and Human Rights: A Theological Apologetic*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES* 485 (1996).

the early modern philosophers' project of finding common values to serve as a basis for intervention. The most prominent of these is religious freedom. As international legal documents articulate it, religious freedom is a right enjoyed through worship, public expression of beliefs, education of children into such beliefs, the operation of houses of worship, schools, universities, seminaries, enjoyment of freedom from discrimination in employment and political access, and the liberty to take up, abandon, proclaim or dissent from one's religion. States threaten this right when they limit these practices through killing, imprisonment, torture, or otherwise discriminating against believers

But this only describes a familiar right, one among many in the liberal pantheon. Why is it that religious freedom is so potentially disruptive? Largely it is because of the frequency, breadth, and increasing scale of its violation. This was the claim, at least, of activists who, during the mid-1990's, succeeded in beginning a national debate in the United States over religious persecution abroad.¹⁰ The chief victims, they claimed, are Baha'is in Iran, Buddhists in Tibet, but most numerous, Christians. It is mainly driven by fundamentalist Islamic governments, Asian governments, especially China, and remaining Communist governments who punish and often kill dissenting worshippers. Systematic and reliable accounts have since corroborated claims of persecution, especially the annual reports of the State Department's Office of International Religious Freedom and the independent Commission on Religious Freedom, established in 1999.¹¹ Ranging from discrimination to death, the violations are not all equivalent and are not all committed by governments. Many are the work of terrorist groups whom governments are powerless to stop. Yet the breadth of denials of religious freedom is nevertheless striking. The most egregious cases are China and the Sudan. In China, the entire population of Tibetan Buddhists has long been persecuted. Christian churches are placed on an official register which admittedly allows ten million Catholics and four million Protestants to worship legitimately, but which also allows the government rigidly to restrict these churches' governance and practice, and, more seriously, to prohibit the worship of an estimated forty to sixty million other Christians. In 1996 and 1997, the government carried out a systematic campaign to eliminate illegal worship, imprisoning and torturing leaders of house churches. In the Sudan, the Muslim government has

10. The most prominent accounts were NINA SHEA, *IN THE LION'S DEN: THE GROWING WORLDWIDE PERSECUTION OF CHRISTIANS* (1997); and PAUL MARSHALL, *THEIR BLOOD CRIES OUT* (1997).

11. See *RELIGIOUS FREEDOM IN THE WORLD: A GLOBAL REPORT ON FREEDOM AND PERSECUTION* (Paul Marshall, ed., 2000); KEVIN BOYLE AND JULIET SHEEN, *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT* (1996).

waged civil war against Christians and animists within their borders, taking over a million of their lives. Systematic and significant restriction of religious freedom is also found in Iran, Vietnam, Pakistan, Cuba, Saudi Arabia, Algeria, North Korea, and elsewhere.

The magnitude of the violations—torture, killings, prohibitions of worship—explains why religious freedom has received so much attention, but not why it provokes such deep dissension over whether it ought to be the object of concern to outside states. Religious freedom is not only an enemy of thuggery and dictatorship, but is also rejected as a matter of principle by some authorities of religious and cultural traditions. For them, religious freedom is not a universal human right, but rather an abdication of an imperative to practice and promote faith publicly. A broad consensus of Muslim scholars interpret full religious freedom as contrary to *shari'a*, or revealed divine law. Even those who find Muslim theology compatible with a broad set of universal human rights often object to the right of Muslims to convert to other religions, and the rights of non-Muslims to practice their faith. Although there is an Islamic tradition of allowing “people of the book”—i.e., Christians and Jews—to worship in enclaves, the tolerance is often shaky, and in any case hardly amounts to a right to religious freedom for individuals. Most egregiously, governments in Saudi Arabia, Yemen, Sudan, Indonesia, Pakistan, Iran, Iraq, Egypt, and Oman persecute and restrict the religious freedom of religious minorities and dissidents who convert away from Islam.¹² There is a more familiar, secular version of uniformity in Communism, too, which cannot allow dissent from its governing ideology. Such principled opposition to religious freedom detracts from an international consensus that this right ought to limit state sovereignty.

For all of this cacophony, though, religious freedom finds strong support in international norms, most importantly, the international legal and declaratory tradition of human rights. Religious freedom is articulated forcefully in Article 18 of the Universal Declaration of Human Rights, a document that has been signed by virtually every state. A thorough version of the right to religious freedom has also been given legal status in the International Covenant on Civil and Political Rights as well as in the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. It is a right that is firmly ensconced in international law.

Religious freedom is also at the heart of the legal traditions and contemporary constitutions of individual states. Having gained immense

12. See Abdullahi Ahmed An-Na'im & Donna E. Arzt, *The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 387 (Witte & van der Vyver eds., 1997).

international prestige through the American and French Revolutions, religious freedom is recognized by the constitution of virtually every western liberal democratic government, as well as by all but a handful of every other constitution in the world—even those of Muslim and Asian States. Twenty-three out of thirty-four majority Muslim states have signed the International Covenant on Civil and Political Rights; there is even a substantial minority of Islamic scholars advocating an “Islamic Reformation” based on a reinterpretation of the Koran that allows the full political toleration of non-Muslims, along with democracy and a distancing of ecclesiastical and temporal authority.¹³

Other major world religions endorse religious freedom as well. Protestant sects were the first to develop a theological basis for it. The Catholic Church has been a major voice for religious freedom ever since it issued the papal encyclical *Dignitatis Humanae* in 1965, and Pope John Paul II has spoken of it forcefully and repeatedly. Jews are also unsurprisingly strong proponents of it, as are Buddhists and many Hindus.

The dilemma that religious freedom poses is this: although religious freedom is central to the tradition of human rights, expressed in both international and constitutional law and in moral and religious sources, it is also contrary to the principled policies of several contemporary regimes. It is a right that, if valid, ought to limit the sovereignty of states, yet one whose validity is deeply contested. Again, recall the historical parallel; during the wars of the Reformation, some parties courted vicious conflict through their claims for universality, while others advocated the tolerance embodied in sovereignty but compromised the universal obligations to which all rulers would be accountable. Relinquishing an important human rights commitment or provoke conflict over deep values: this is the difficult choice.

To side with the human rights tradition is to endorse its claims upon the sovereignty of violator regimes and the legitimacy of the tools through which these regimes might be pressured—if not military intervention, then certainly condemnations, judicial proceedings, sanctions by international organizations, and threats by other states to withdraw military and economic aid. Religious freedom would become one of the core rights that warrant interference with sovereignty, part of the common obligation of every ruler. The competing danger is that a religious and cultural backlash will weaken those institutions and practices whose limitation on sovereignty now enjoys a frail consensus—intervention, international judicial norms. The result will either be a resealing of the

13. See the symposium on Islam and democracy in 7 J. OF DEMOCRACY 52 (1996), especially articles by Bernard Lewis, *A Historical Overview*, at 52, and Robin Wright, *Two Visions of Reformation*, at 64.

Westphalian vault or a pandemonium of proliferating unilateral claims upon sovereignty, both of the early modern extremes that ought now to be avoided.

Given that religious freedom is firmly in the human rights tradition, yet capable of fracturing it; is religious freedom, then, properly the object of scrutiny across borders? There is in fact a strong case to be made for the scrutiny, for the policy, for the promotion, and against the abandonment, of religious freedom. Today, promoting religious freedom is both more possible and more urgent than it was in early modern Europe. Then, individual religious freedom was only a remote political possibility. Only a few philosophers even conceived it; almost no political leader countenanced it. After a century of religious war, Westphalia's compromise on tolerance for religious groups was the best that European rulers could achieve. Today, the vast majority of states both endorse the human rights laws into which religious freedom is written, and include religious freedom in their own constitutions. Nor is any dispute over religious freedom likely even to approach war, much less the wars of early modern Europe. The strongest likely US policy, for instance, would involve diplomatic *démarches* and mild economic sanctions. While such measures may heighten tensions between the US and their target states, they will not cause the clash of civilizations.

The urgency of religious freedom lies most of all in its importance to the human rights tradition. To neglect it would be to abandon a right that is not only a central plank in the tradition, but is now being massively violated, perhaps more than any other class of rights. Abandonment would, it follows, cripple the credibility of any national policy, international regime, or advocacy group committed to human rights. If international human rights do not embrace a right that is both deeply institutionalized and yet among the most violated of all rights, then what does human rights mean at all? The very integrity of human rights, then, demands that religious freedom be included in the project of building and fortifying the portfolio of commitments that are thought to properly limit state sovereignty.

A state committed to human rights should, then, like human rights NGOs and international organizations, promote religious freedom abroad. But this policy ought to be balanced against a concern for destroying a consensus around other human rights. Finding this balance is the present dilemma for American foreign policy. The dilemma has arisen, to be sure, from the efforts of moral activists who put it there. Christians are the most numerous, but are far from lone voices. Prominent Jewish leaders, including A.M. Rosenthal of the *New York Times*, Michael Horowitz of the Hudson Institute, and leaders of B'nai B'rith,

have spoken out on the issue, finding religious persecution all too haunting. Rosenthal writes, "If I were Christian I would complain that Christian leaders, political religious and business, around the world, have failed in their obligations to fight oppression of their co-religionists. I am complaining anyway."¹⁴ The National Association of Evangelicals issued a "statement of conscience" on the subject, joined by the Southern Baptist Convention, the American Episcopal Church, the Presbyterian Church USA, and the United Methodist Church. The US Catholic bishops have spoken out on this topic as well.

It was in response to this pressure by religious groups that Congress in the fall of 1998 passed the International Religious Freedom Act, which ensured the importance of religious freedom in American foreign policy. Modeled on the 1970's Jackson-Vanik legislation, which was designed to pressure the Soviets to ease their repression of the Jews, the bill created an Ambassador at Large, a standing Commission on International Religious Persecution, an Office for International Religious Freedom at the State Department to monitor and report annually on religious persecution abroad, and required the President to apply sanctions on violator governments. Possibilities for sanctions ranged from a diplomatic *démarche* to a withdrawal of foreign assistance, with the possibility of a waiver where vital national interests are at stake. The Office of International Religious Freedom and the Commission on International Religious Persecution have now been operating since 1999 and have each issued five annual reports.

The International Religious Freedom Act has its critics, too. For instance, William Martin, a scholar normally sensitive and fair to religion, described the Act in *Foreign Policy* as one mingled in a conservative religious agenda with predictions about the coming of the Antichrist and a fundamentalist suspicion of the European Union and the Trilateral Commission.¹⁵ More surprising still is opposition from the human rights community itself. Kenneth Roth, the executive director of Human Rights Watch, has dismissed the issue as "special pleading" on behalf of "certain classes of victims."¹⁶ He told Jacob Heilbrunn of *The New Republic* that the claims on behalf of persecuted Christians did not deserve special status in human rights reports or in policy.¹⁷

14. A.M. Rosenthal, *Persecuting the Christians*, THE NEW YORK TIMES, February 11, 1997, at A21.

15. William Martin, *The Christian Right and American Foreign Policy*, 114 FOREIGN POLICY 66 (1999)

16. Samuel G. Freedman, *Horowitz' List*, NEW YORK TIMES Magazine, March 31, 1997, at 101.

17. Jacob Heilbrunn, *Christian Rights*, THE NEW REPUBLIC, July 8, 1997, at 23.

These dismissals are troubling. The centrality of religious freedom in the human rights tradition, its support from a broad array of religions and denominations, and the breadth of its contemporary violation themselves refute the charge that the issue is the narrow concern of a single lobby. The charge of special pleading is particularly puzzling. Would the same critics consider human rights campaigns on behalf of South African blacks, Soviet Jews, the Argentine "disappeared," the eradication of female genital mutilation, or the banning of land mines to be special pleading? Referring to Roth's remark, Heilbrunn commented, "This seems a remarkable attitude for a human rights activist, since, by definition, all arguments on behalf of all persecuted groups—racial minorities, political minorities, ethnic minorities, etc.—are 'special pleadings' intended to help 'certain classes of victims.'"¹⁸ Concerns about narrow particularity, however, should not be dismissed entirely; a fair, inclusive policy is one that supports the religious freedom of all believers, not just Christians. Both the congressional legislation and the annual reports of the State Department office and of the Commission are inclusive in precisely this respect. The reports have detailed the denials of the religious freedom of Muslims in Saudi Arabia, India, China, Uzbekistan, Turkmenistan, Egypt, Russia, Azerbaijan, Kazakhstan, the Kyrgyz Republic, Pakistan, Bangladesh, France, and other European countries, of Hindus in Bangladesh, of scientologists in Germany and elsewhere, and of Moonies in Western Europe.

There are, of course, more pragmatic objections to a foreign policy of combating religious persecution. One is the objection to which I have already alluded—that it would destroy an already fragile global consensus on human rights, a consensus that has indeed allowed intervention to remedy colossal human suffering over the past decade. Other objections are familiar Realist ones toward all human rights policies. Governments themselves are not always behind the violation of religious freedom. Sanctions need to take account not merely of the level of a regime's human rights violations, but also of the trends in its violations; are they getting better or worse? Sanctions could cause a violator government to retreat inward, even intensifying its repression. Or, in the case of economic sanctions, more damage may be caused to a country's indigent population than harm to its privileged class. Finally, sanctions may undermine other important foreign policy goals such as peace or stability.

All such considerations are important. But the International Religious Freedom Act, through its broad range of means, allows a President to factor all of them into the process. This same flexibility also allows the President to balance religious freedom with the need for cooperation

18. *Id.* at 23.

on other initiatives that properly limit sovereignty—intervention, for instance. Together, Realist objections muster a call for a judicious, case-by-case religious human rights policy, one balanced against other foreign policy goals. But, on the whole, Realism hardly nullifies the case for such a policy. Nor still does it account for past successes of human rights policies, for instance, in undermining the apartheid regime in South Africa and emboldening eastern European dissidents under communist regimes.

If religious freedom is to be a robust international norm rather than the subject of global culture wars, it is also important to strengthen the global consensus on religious freedom. Consensus is built best in hearts and minds, which are accessed most easily by civil society actors. President Khatemi of Iran and Pope John Paul II, for instance, have mutually called for a “dialogue of civilizations” between Christianity and Islam. But norms are strengthened, too, by the diplomatic actions of states, particularly actions aimed at coaxing non-signatory states to accede to human rights conventions that promoted religious freedom. In this way, religious freedom is coming to enjoy global legal authority.

The best argument favoring religious freedom as a foreign policy concern is that it draws attention to the actions of regimes that use the shield of state sovereignty to violate their citizens’ rights to worship freely. The most effective measures of the legislation is its annual review process, through which it gives global publicity to religious persecution, holding accountable the violator regimes as well as the White House and the State Department. The religious freedom policy’s key short-term successes, like the key short-term successes of all human rights policies of single states, will not likely be major changes in the structures, or perhaps even the major policies, of foreign regimes. Rather, success lies in the consistent exposure of cases of imprisonment and torture of religious dissenters, raids on underground house churches, and the murder of worshipping minorities. Sometimes success will mean the release of the prisoners and an end to the raids and murders. But as the example of South Africa and Eastern Europe teach us, the successes of human rights policies can be long-term and dramatic, too.

Religious freedom embodies the moral challenge of an international system that is beginning to move past Westphalia. Unlike early modern Europe, which could not find an alternative between absolute sovereignty and debilitating religious war, the present world has been able to forge a thin but fragile consensus on values that warrant the circumscription of state sovereignty. It is also, however, a world of deepening religious conflict, where one civilization’s skepticism of another’s assertions of universality evokes worries of early modern Europe’s

fractiousness. In today's world, the most difficult questions will be ones over rights and values that some argue to be universal and some argue to be the ideals of one aggrandizing civilization. Religious freedom is the best example. The heritage of the human rights tradition suggests that religious freedom is a universal right. But if it is to enjoy a popular global consensus that matches its prominence in international treaties, then such a consensus must be forged—slowly, carefully, through a process of vigorous and mutual dialogue.